STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Arbitration Between

Civil Service Employees Association, Local 801 (Union)

and

Albany Housing Authority (Employer)

RE: Hiring Rate Grievance – R. Madsen

Case No. A201-354

ARBITRATOR'S OPINION AND AWARD

Before Frederick P. Day, Arbitrator

Appearances

For the Union

NANCY E. HOFFMAN, ESQ.
CIVIL SERVICE EMPLOYEE'S ASSOCIATION, INC.
By Daren J. Rylewicz, Esq., Of Counsel

For the Employer

BRENNAN, REHFUSS & LIGUORI, P.C.
By Joseph M. Brennan, Esq.

In accordance with the collective bargaining agreement between the above captioned parties, the undersigned was designated to hear and

resolve a dispute regarding the interpretation of their Collective Bargaining Agreement, dated July 1, 2000 – June 20, 2003 (Agreement). The undersigned conducted a hearing at Albany, New York on October 1, 2002 at which the parties were present with competent representation. The parties were accorded a full and fair hearing, including the presentation and cross-examination of sworn witnesses and documentary evidence, as well as presentation of written summary and argument of their respective positions. Upon receipt of the parties' briefs, the undersigned closed the record.

ISSUE

The parties were unable to stipulate to the issue. They therefore each propose the following:

Union:

"1. Did the employer violate the collective bargaining agreement by hiring employees at a salary step above the 'Step A' within their respective salary grades?"
And "2. If so, what shall the remedy be?"

Employer:

"1. Is the Grievance filed September 14, 2001 untimely under Section 14.2.1 of the Collective Bargaining Agreement?
2. If the answer to # 1 is 'yes', did the grievant, by virtue of the delay in filling the grievance dated September 14, 2001 acquiesce in the conduct complained of in the grievance dated May 28, 2002?
3. If the answer to ether #1 or #2 above is 'no', did the employer act in bad faith or unreasonably in violation of the Collective Bargaining Agreement by hiring employees at a salary step above 'Step A' within their respective salary grades?
4. If so, what shall the remedy be?"

CONTRACT LANGUAGE

5.1 SALARY SCHEDULE: Employees shall be paid at the salary set forth in Appendix "A" for the grade and step they occupy, subject to the terms of Article 5.8 if applicable.

5.2 STEP SCHEDULE: Step A shall be designated "Entry Level" and Step E shall be designated "Job Rate". The salary schedule shall be constructed as follows:

Service	Step	Salary
1st year	A	80% of Job Rate
2nd year	B	85% of Job Rate
3rd year	C	90% of Job Rate
4th year	D	95% of Job Rate
5th year	E	100% of Job Rate

5.6 ELIGIBILITY OF STEP INCREASES: An employee must serve in a particular grade and step at least 6 months before becoming eligible to move to the next step.

5.8.1 INCREASES ON PROMOTION: Employees promoted or otherwise advanced to a higher salary grade shall be paid at the entry level rate of the higher salary grade or will receive a percentage increase in base pay determined as indicated below, whichever results in a higher salary.

For a Promotion of:	An Increase of:
1 grade	3.0%
2 grades	4.5%
3 grades	6.0 %
4 grades	7.5%
5 grades	9.0%

14.1.4 GRIEVANCE shall mean any dispute arising, concerning the interpretation or application of the terms of this Agreement or the rights claimed to exist thereunder.

14.2.1 STEP 1: Within thirty (30) days after an employee knows or should have known that a grievance occurred, an employee or his or her representative shall present the grievance in writing to his or her department head….

14.2.3 STEP 3: The Arbitrator shall have no power to make any decision which requires the commission of an act prohibited by law or which is violative of the terms of this Agreement. The threshold issue to be decided by the arbitrator shall be whether the contract has been violated and, if so, what the remedy shall be. If the claimed violation of the contract involves a discretionary act by the employer either by commission or omission, such as a decision to allow or deny leave time or to promote one employee over another, then the specific issue to be decided by the arbitrator is whether the employer acted in bad faith or unreasonably.

19 MANAGEMENT RIGHTS: Except as expressly limited by other provisions of this Agreement or applicable laws, all authority, rights and responsibilities possessed by the employer are retained by it. These include, but are not limited to:

The right to determine the mission, purpose, objectives, and policies of

the employer:
To determine the facilities, methods, means and number of personnel required for conduct of the Authority's programs and operation:
To administer the selection, recruitment, hiring, appraisal, training, retention, promotion, assignment or transfer of employees pursuant to law;
To determine whether positions shall be full-time, part-time, salary or hourly:
To direct, deploy and utilize the work force:
To establish the specifications for each class of positions and to classify or reclassify, and to allocate or reallocate new or existing positions in accordance with law:
To determine the hours and days of operation of the Authority and the services, facilities and programs to be provided to the public.

BACKGROUND

Briefly, the instant grievance is a consolidation of two separate grievances filed on September 14, 2001 and May 28, 2002 (Joint Exhibit 1, Exhibits B, F and G). Both grievances allege that the Employer violated Articled 5.2 when it hired certain employees above the "entry-level" salary. The September grievance also alleges that the Employer was obligated by "long established past practice" with the respect to the interpretation of the cited Article 5.2.

The basic facts giving rise to the grievances are undisputed. The Employer hired three employees[1] above the "Entry Level"[2] salaries for their grades. On November 15, 2000 the employer hired SC[3] at Step E, also called the "Job Rate." On April 11, 2001, the Employer hired AT at Step C. On May 8, 2002, the Employer hired AM at Step E (Employer Exhibit 1, Joint Exhibit 4). All three were hired within grades appropriate to their duties.

According to Robert Madsen, who is the Vice President of the Union and the person who filed the grievance dated September 14, 2001, "no more than three or four days" before filing the grievance he had a conversation at the work site with SC. During the conversation, SC mentioned "in passing" that his hourly rate was "not cutting it." Upon inquiry and investigation, Madsen learned that SC had been hired at the Job Rate. Upon further investigation, he discovered that another employee, AT, had also been hired above the entry-level salary. According to Madsen, he did not know about the salary rates paid to these employees and had no way of knowing. He testified that he assumed that

[1] A fourth employee was discovered from the data generated for the hearing and is not a subject of the instant grievance.
[2] Quotation marks are used in the original text.
[3] Because the employees are not parties to these instant grievances, I will use their initials to protect their identities.

the Employer routinely hired employees at the entry level for their respective grades.

Union President, Jack Rohl, testified that he was not aware of the Employer's hiring above the entry-level rate. He assumed that employees were, as a matter of course and in accordance with the Agreement, hired at the entry rate. He also testified that the language contained in Article 5 governing hiring rates was inserted into the Agreement twelve years earlier. Although he was a member of the negotiating team when the parties added the language, he was unable to recall any bargaining table conversations with respect to the language.[4]

According to Rohl, although, perhaps two years earlier, he had received seniority lists from the Employer, he had not received such notices for approximately two years. During that hiatus, when he attempted to obtain the payroll data from the personnel director, she refused his request. He therefore had to seek the intercession of the Deputy Director to obtain the data.

The Deputy Director, Barry Romano, was also present at the negotiations leading to the 1990 Agreement. He, too, did not recall any discussion between the parties with respect to the term "entry level." He also acknowledged that he indeed needed to intervene with the Personnel Director and Payroll Director to assist Rohl in obtaining the employee data he requested.

With respect to the employees in question, Romano considered them worthy of hiring above entry level. AT was a temporary employee at Grade 8, Step A when he was moved to permanent status at Grade 6, Step C. AM was a returning employee with prior experience with the Employer.[5]

Romano also testified that identical language as that alleged to be violated in the instant grievance also exists in a labor agreement between the Employer and another bargaining unit. He testified that hiring employees in that other unit above the entry level has not been contested.

POSITIONS OF THE PARTIES

Union

The Union's argument can be briefly summarized as follows:

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[4] The language was indeed added in 1990. In the Agreement just before 1990, there was a five-step schedule with two additional longevity steps. The Agreement contained no language referencing entry level or job rate. An additional change eliminated the longevity steps, replacing them with three lump sum bonus type payments not structured permanently into the pay scale schedule (See Employer Exhibits 2 and 3). There is no evidence of a *quid pro quo* between the hiring rate language and the longevity changes.

[5] According to Rohl, SC was a temporary non-unit employee from November 2000 to April 2001. He was a private contractor before being hired by the Employer.

The Union rejects the Employer's claim that the grievances are untimely. The Union's officials did not know of the hiring practice grieved in the instant grievance until the conversation between Madsen and SC in September. Rohl filed the second grievance upon learning of AM's hiring status in May 2002. Neither of the two officials had reason to know of the Employer's hiring practices until Madsen's conversation with SC. The Union was no longer receiving certified seniority lists from the Employer and repeated requests by Rohl for such lists had been denied by the Employer's agents until the conclusion of lengthy discussions and the ultimate intervention from the Deputy Director. Thus, because the grievance procedure requires that an employee file a grievance within thirty days from the time he or she knew "or should have known" of an occurrence, the grievances are timely.

With respect to the substance of the grievance, the language in Article 5.2 is "clear" and to give it any other meaning would "render" the language "meaningless." Further, "to allow the [Employer] to hire employees who are members of the CSEA bargaining unit at whatever starting salary it desired would vitiate Article 5, Section 5.2 altogether." The language is "clear and unequivocal" and, because it is, arbitrators "generally will not give it a meaning other than that expressed." In addition, "It is axiomatic in contract construction that an interpretation which tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect." Words should "not be declared surplusage if a reasonable meaning can be given to it consistent with the rest of the agreement."

Finally, up to the time the Employer supplied the Union with up to date seniority information, it hired new employees at the entry level. Not until the Employer ceased supplying the lists, did the Employer hire above the entry level; that is, from 1990 to 2001.

The undersigned should return the employees, SC, AT and AM, to their proper steps.

Employer

The Employer's position can briefly be summarized as follows:

The initial grievance filed in September 2001 regarding SC and AT is untimely, because the Union filed the grievance ten months after SC was hired and 5 months after AT was hired. The Union had access to the payroll information at any time it wanted such information and that, indeed, when the Union requested the information from the person in charge of payroll, it received the information when requested in May 2001. The Union was responsible for obtaining such lists and, because it did not, it demonstrated no interest in the hiring rates of new employees until Madsen raised the issue. Until Madsen raised the issue, "the Union

did not consider the contract to contain any restrictions on the employers (sic) right to hire. With respect to the grievance filed in May 2002 regarding AM, the Union acquiesced in the hiring when it initially failed to file timely grievances regarding SC and AT.

If the undersigned finds that the instant grievance is timely, the grievance involves a claimed violation of a "discretionary act by the employer" and that the undersigned is restricted to finding whether the Employer acted in "bad faith or unreasonably." The Employer rests its argument on the "Managements Rights" language contained in the Agreement, to wit; "Except as expressly limited by other provisions of this agreement…all authority, rights and responsibilities possessed by the employer are retained by it." These rights include the "selection, recruitment, hiring [and] appraisal" of employees. Article 5.2 contains "no language expressly stating that the employer may not hire new employees at a level other than Step 'A.' " If the language was intended to place such a restriction, it should have been expressed as: " 'new employees shall be hired at step 'A.' "

The language, "entry level," means the skill level of employees to paid at the entry rate. In any event, it is the Union's burden to show, by a preponderance of the evidence, that the language was intended to mean what the Union claims it means, that is, to restrict the Employer from hiring new employees above the "entry level."

The undersigned should ignore the past practice, because, even if the past practice was consistent, the Employer, in acting on discretionary matters, is not obligated to refrain from deviating from even consistent practices. The Employer cannot be seen as abandoning its discretionary prerogatives. Furthermore, the Employer has applied the contract with another bargaining unit containing identical language as the Employer applied the language in the instant matter. Therefore, the Employer's practice has not been consistent.

Finally, the remedy sought by the Union is "enigmatic." In essence, the Union wants the employees in question demoted. This action would be detrimental to those employees and would fail to benefit any other employees. The very nature of the request "serves to demonstrate the irrationality" of the Union's position. It further demonstrates that the instant grievance "stems from" Madsen, "who was unhappy that another individual…was earning more money than [he]." The instant grievance reflects "an effort to 'carry the flag' for …Madsen who happens to be Executive Vice President of the Bargaining Unit."

DISCUSSION

Timeliness

Upon the evidence, I find that the grievance is timely and therefore arbitrable.

The Agreement imposes a thirty-day time limit for filing grievances. Ordinarily, I am inclined to enforce clearly stated time limits upon the parties, unless evidence or extenuating circumstances dictate otherwise. In the instant matter, the time limit is modified, and therefore rendered less certain, by the words, "knows or should have known." (Emphasis added) These words open the crucial question: Should the Union have known of the Employers' hiring practice with respect to employees SC and AT on or within thirty days following their hire?

The evidence indicates that for a lengthy period, perhaps as long as two years prior to the September 2001 grievance, the Employer ceased supplying the Union with seniority rosters. Upon the Union's insistence and with the intervention of the Deputy Director, the Employer once again began supplying the seniority information sometime in May of 2001. Furthermore, as the Employer established upon cross-examination of Rohl, the Employer never routinely supplied payroll information to the Union. The information supplied in May was a seniority roster. Rohl denied having ever seen a complete list of new hires, by grade and hiring step, until the day of the hearing in the instant matter.

The evidence also indicates that, since 1990 and until the Employer hired SC, new hires were routinely hired at the "entry level." There is nothing in the record to convince me that the Union had any reason to suspect that the Employer deviated from hiring new hires at the "entry level."

When Madsen engaged in his conversation with SC in September 2001, he discovered that SC, although hired a year and one-half later, was earning more than Madsen. I credit Madsen's testimony that the conversation was the first time he had learned of SC's pay scale. I also credit Rohl's testimony regarding his frustrated attempts to obtain seniority and payroll information from the payroll department. His testimony is supported by Romono's, who admitted that Rohl's attempts to obtain the information were indeed frustrated and that it required Romono's intervention, on more than one occasion, to finally convince his subordinates to release the information as requested.

For the above reasons, I find that the Union filed the grievance within thirty days from the time Madsen and Rohl knew that SC, (then, later, AT) were hired at steps higher than Step "A" in their respective grades. I also find that the union would not have known of the alleged violations sooner. With respect to the second grievance regarding AM filed in May 2002, because the first grievance is timely, this grievance is not lost.

Substance

Upon the entire record before me, I find that the Employer violated Article 5.2 of the Agreement when it hired SC, AT and AM at steps above the "Entry Level" for their respective grades.

Neither party was able to shed any light with respect to how or why the language contained in Article 5.2 was inserted into the Agreement in 1990. There is no evidence even as to which of the parties constructed the language. I must turn, therefore, to the language itself as the best evidence. Applying its literal meaning, the language is clear and unambiguous. It states: "Step A shall be designated 'Entry Level….' " "Entry" is defined as the "right or privilege of entering" or "the act of entering." "Entry-level" is defined as, "of or being at the lowest level of a hierarchy."[6] This definition is supported by the language immediately following, which states, "Step E shall be designated 'Job Rate.' " In the schedule itself, constructed immediately below the language, there are five steps from Step A to Step E, inclusive, which directly connect each step with a year of service, that is, Step A with the first year of service, Step B with the second, and so on down the list to Step E. In addition, each step is equated to a percentage of the "Job Rate," that is, first year, Step A is 80% of "Job Rate," second year, Step B is 85%, onward to Step E, which is 100% of "Job Rate."

I disagree with the Employer's contention that Article 19, the Management Rights clause, gives the Employer unfettered rights with all matters involving hiring. Clearly, the language contained in Article 5.2 expressly limits the wage rate at which the Employer may hire entry-level employees. No other expressed limits with respect to hiring are placed upon the Employer, nor is the Union claiming any.

The employees in question, despite any previous experience with the Employer or outside experience, were all entry-level hires insofar as their unit positions were concerned. Absent contract language instructing me otherwise, I cannot credit temporary, non-unit experience or previous broken experience with the Employer. The Union has the sole right to bargain terms and conditions of employment for positions in their bargaining unit and to establish wage rates, including starting rates, within that unit through collective bargaining.

With respect to promotions, the evidence indicates that certain employees were promoted at rates that exceeded the guidelines expressed in the Agreement, Article 5.8.1. The Employer contends that it therefore follows that the Employer had the right to exceed the entry level when hiring new employees. However, the evidence also indicates that when the Employer promoted above the stated guidelines, it did so with the knowledge and consent of the Union. Thus, given the dissimilarity of the facts and circumstances, I cannot credit the Employer's contention.

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[6] See Merriam-Webster's Collegiate Dictionary, Tenth Edition, Springfield, MA (1997).

The Employer also contends that one other bargaining unit employee, JG, was hired on April 17, 2001 at Step D, yet the Union failed to grieve his hiring rate. However, according to Rohl, whose testimony I credit, he was unaware that JG was even in the bargaining unit. According to his testimony, Rohl was not aware that JG was in the bargaining unit until he saw JG's name on Exhibit Joint 4 at the hearing. Indeed, JG's title does not appear in Article 3.1 as a bargaining unit title. Accordingly, I cannot deny the instant grievance based upon the Union's failure to grieve JG's hiring rate.

Although it has violated the Agreement, the Employer has not acted in bad faith or unreasonably. It is commonly expected and accepted that reasonable persons will differ as to the meaning or application of an agreement. In the instant matter, the parties are engaged in a reasonable dispute as to the meaning and application of their Agreement.

In conclusion, when it bargained for an entry rate and job rate for bargaining unit positions, the Union acted within the commonly accepted boundaries of collective bargaining. The language contained in the Agreement is there for a purpose. When the parties inserted the language, they did not engage in frivolity. Because I must give the language meaning in resolving this dispute, I have no other alternative but to accord the langue its clear and literal meaning.

With respect to remedy, this matter presents a quandary. To reduce the pay level of the employees involved would punish them for the Employer's contractual transgression, an act that would be both unfair and draconian. On the other hand, the employees in question, against the limits of the Agreement, have gained a windfall not experienced by other employees. Both parties afford me broad discretion in fashioning a remedy in this matter. Accordingly, I will hold that, since the employees experienced a windfall, they be frozen at step until their time on the job catches up to their Step placement. In other words, for each step granted upon hire above the entry level, the employee will be frozen for one year. This freeze does not include raises they might receive as the pay rates for their respective steps increase in accordance with the Agreement.

AWARD

Having carefully and thoroughly considered the sworn testimony, documentary evidence and arguments by the parties regarding the disputed issues, the undersigned awards as follows:

1. The Grievance filed on September 14, 2001 is timely.
2. The Grievance filed on May 28, 2002 is properly joined to the Grievance filed on September 14, 2001.
3. The Employer violated the Agreement when it hired employees at a salary step above Step A within their respective grades.
4. Those employees, JC, AM and AT, shall be frozen on their respective current steps and shall not advance further, including advancement to longevity, for one year for each step hired above Step A. However, as the rate at their respective frozen steps increase due to negotiated raises, they shall receive the new amounts in accordance with the rates established by the Agreement.

DATE _January 8, 2003_ SIGNED
_____/S/_____

I, FREDERICK P. DAY, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

_____ _____